WHO MAY RECOVER FOR INJURY FROM A NUISANCE?—A private[1] nuisance was regarded by the common law as "anything done to the hurt or annoyance of the land, tenements or hereditaments of another."[2] For such an injury the law provided a freeholder the real actions of assize of nuisance,[3] while holders of a lesser estate were confined to an action on the case for damages. The latter remedy has practically supplanted the others.[4] The concept of a nuisance, however, has expanded so as to include not only physical injury to the realty, but also an appreciable interference with the use and enjoyment of it.[5] The owner of the premises may always recover for any permanent injury;[6] and, if he is in possession, or even if the land is unoccupied,[7] he is entitled to damages for all temporary injuries, but if a tenant is in possession of the land, such damages are properly recoverable by him alone.[8] The essence of an action for temporary injuries is the disturbance of the right to the quiet enjoyment of possession,[9] and therefore, a mortgagor in possession may recover even though the premises have been foreclosed by the mortgagee.[10]

Because of the origin of the action for a nuisance as a remedy for injury to the realty, recovery has generally been restricted to the holder of some estate in the land affected by the nuisance.[11] For this reason, a mere lodger has been denied relief on the ground that he may move and thus avoid any injurious results.[12] When, however, a father sought

[1]If a private individual suffer some special damage from a public nuisance, even though it be but consequential, he may recover just as in the case of a private nuisance. See Shed *v.* Hawthorne (1874) 3 Neb. 179; Center & Treadwell *v.* Davis (1869) 39 Ga. 210; Hughes *v.* Heiser (Pa. 1808) 1 Binn. 463; Pittsburg *v.* Scott (1845) 1 Pa. 309; Rose *v.* Miles (1815) 4 M. & S. 101; *contra,* Hubert *v.* Groves (1794) 1 Esp. 148; Savannah F. & W. Ry. *v.* Parish (1903) 177 Ga. 393; Schoen *v.* Kansas City (1896) 65 Mo. App. 134.

[2]3 Bl. Comm. 216; Paddock *v.* Somes (1890) 102 Mo. 226, 237; Heeg *v.* Licht (1880) 80 N. Y. 579, 582.

[3]3 Bl. Comm. 220; see Waggoner *v.* Jermaine (N. Y. 1846) 3 Den. 306.

[4]See Cornes *v.* Harris (1848) 1 N. Y. 223; Waggoner *v.* Jermaine *supra.* Writ of nuisance has been declared obsolete in New York. Knitz *v.* McNeal (N. Y. 1845) 1 Den. 436.

[5]Addison, Torts, (8th ed.) 486; Joyce, Nuisance, §2; Lowe *v.* Prospect Hill Cem. (1899) 58 Neb. 94. An action lies by an individual for a disturbance of a right held in common with others. Lynn *v.* Hooper (1899) 93 Me. 46.

[6]See Hine *v.* N. Y. Elec. Ry. (1891) 128 N. Y. 571; Jesser *v.* Gifford (1767) 4 Burr. 2141.

[7]Wilson *v.* Townend (1860) 1 Dr. & Sm. 324; Ruckman *v.* Green (N. Y. 1876) 9 Hun 225; Faulkenbury *v.* Wells (1902) 28 Tex. Civ. App. 621; Wilcox *v.* Henry (1904) 35 Wash. 591.

[8]Note that in Hine *v.* N. Y. Elec. Ry. *supra* the tenant has a concurrent remedy.

[9]Brink *v.* Edwards Corrugating Co. (1911) 142 Ky. 88; Ackerman *v.* Ellis (N. Y. 1911) 79 Atl. 883. Even a weekly tenant may enjoin a nuisance really injurious to health. See Jones *v.* Chappell (1875) L. R. 20 Eq. 539.

[10]Lurssen *v.* Lloyd (1892) 76 Md. 360. No recovery, however, may be had for damages prior to the date of taking possession. Watson *v.* Colusa-Parrot M. & S. Co. (1905) 31 Mont. 513.

[11]Ellis *v.* Kansas etc. R. R. (1876) 63 Mo. 131; Kavanagh *v.* Barber (1892) 131 N. Y. 121, approved in Hughes *v.* Auburn (1899) 161 N Y. 96. This case, however, was decided on another ground.

[12]Miller *v.* Edison Elec. Ill. Co. (N. Y. 1901) 33 Misc. 664.

to recover damages for the death of his infant son who died as a result of a nuisance maintained by the defendants, the Supreme Court of Alabama in the recent case of *Hosmer* v. *Republic Iron & Steel Co.* (1913) 60 So. 801, following the decision in the case of *Ft. Worth & R. S. Ry.* v. *Glenn,*[13] allowed the plaintiff to prevail, though the infant had no estate in the premises. The parent had no standing in the court upon his complaint unless it stated a cause of action which would have been available to the decedent;[14] the court, therefore, necessarily based its decision upon the theory that the infant resident in his father's house could have maintained an action on his own behalf for the injury to his health caused by the nuisance.

The doctrine of such a recovery grows out of the right of the owner of an estate in the land to obtain damages for injuries to the health of his family,[15] when the defendant's unlawful maintenance of a nuisance interferes in the enjoyment of his proprietary interest. The supporters of the holding in the case under consideration assert that the gist of such an action is the resulting damage to the persons of the occupants and not the injury to the realty, and consequently, they advocate an expansion of the common law to provide a remedy for the injured parties whether they have an estate in the premises or not. While this view presents somewhat of an extension of the strict common law conception of a nuisance, such an expansion in order to give a remedy to an infant, living with his parents on the latter's premises, seems thoroughly justifiable; for there appears to be no occasion for compelling an infant to leave his father's home to avoid the consequences of another's unlawful act,[16] which is really an injury to the occupancy of the land. Nor is there any satisfactory reason for confining his recovery to an action for negligence and refusing to sustain an action on the case for a nuisance,[17] to which no defense of contributory negligence is available.[18] Since the law recognizes the injury to the person of an infant as a proper element of the damages awarded to a landowner for an interference with the enjoyment of the premises, the court in the principal case very properly invoked the flexibility of the common law to preclude the defendant from escaping his liability to compensate the party whose health was impaired as a natural consequence of the wrong, upon the technical ground that the one injured held no proprietary interest in the land.[19]

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[13](1904) 97 Tex. 586.

[14]Civil Code of Ala., (1907) § 2485; Lovell *v.* DeBardelaben C. & I. Co. (1889) 90 Ala. 13; Williams *v.* S. & N. Ala. R. R. (1891) 91 Ala. 635.

[15]Kearney *v.* Farrell (1859) 28 Conn. 317; Story *v.* Hammond (Ohio 1832) 4 Hammond 376; Cohen *v.* Rittman (Tex. 1911) 139 S. W. 59; Eufaula *v.* Simmons (1888) 86 Ala. 515. But a wife cannot recover, because she is not deprived of the services of the husband or child. Corsicana Cotton Oil Co. *v.* Valley (1896) 14 Tex. Civ. App. 250.

[16]This contention seems obviously sound in view of the rule which recognizes the right of a lessee to recover though he entered into or renewed his lease after the creation of the nuisance and with full knowledge thereof. Central R. R. Co. *v.* English (1884) 73 Ga. 366; Hoffman *v.* Edison Elec. Ill. Co. (N. Y. 1903) 87 App Div 371; see Bly *v.* Edison Elec. Ill. Co. (1902) 172 N. Y. 1.

[17]Ft. Worth etc. Ry. *v.* Glenn *supra;* see Towaliga Falls Power Co. *v.* Sims (1909) 6 Ga. App. 749.

[18]Satterfield *v.* Rowan (1889) 83 Ga. 187; Vogt *v.* Grinnell (1907) 133 Ia. 362.

[19]See cases cited in notes 14 *supra.*